Supreme Court, U. S.
FILED
JUL 2 1980
MICHAEL RODAK, JR., CLERK

No. 79-1880

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

LAKE LAWRENCE, INC., et al.,

Appellant,

vs.

THURSTON COUNTY, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

MOTION OF APPELLEES TO DISMISS OR AFFIRM

PATRICK D. SUTHERLAND
Thurston County Prosecuting Attorney

ALEXANDER W. MACKIE
Special Deputy Prosecuting Attorney
Owens, Weaver, Davies & Dominick
926 - 24th Way, SW
Olympia, WA 98502

Counsel for Appellees

No. 79-1880

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

LAKE LAWRENCE, INC., et al.,

Appellant,

vs.

THURSTON COUNTY, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

MOTION OF APPELLEES TO DISMISS OR AFFIRM

PATRICK D. SUTHERLAND
Thurston County Prosecuting Attorney

ALEXANDER W. MACKIE
Special Deputy Prosecuting Attorney
Owens, Weaver, Davies & Dominick
926 - 24th Way, SW
Olympia, WA 98502

Counsel for Appellees

No. 79-1800

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

LAKE LAWRENCE, INC., et al.,

Appellant,

v.

THURSTON COUNTY, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

The Appellees move the court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of Washington on the ground that the issues raised are questions not properly addressed to this Court or are so insubstantial as not to need further arguments.

TABLE OF CONTENTS

Page

MOTION TO DISMISS OR AFFIRM 1
THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE 2
ARGUMENT 8

1. The Appeal Should be Dismissed for Failure to Raise a Substantial Federal Issue 9
2. The Decision Below Should be Affirmed 9

CONCLUSION 12

TABLE OF AUTHORITIES

Agins v. City of Tiburon
40 CCH S. Ct. Bull. p. B2864 (No. 79-602 June 10, 1980) 9

Cardinale v. Louisiana
394 U.S. 437, 438 (1969) 12

Department of Natural Resources v. Thurston County
92 Wash. 2d 656, 601 P.2d 494 (1979) 2, 10, 12

Graver Tank & Mfg. Co. v. Linde Air Products Co.
336 U.S. 271 (1949) 11

Lloyd A. Fry Roofing Co. v. Wood
344 U.S. 157, 160 (1962) 11

Page

Penn Central Transportation Company v. City of New York
438 U.S. 104 (1978) 9

United States v. Johnston
268 U.S. 220, 227 (1925) 11

Wilson v. Loew's, Inc
355 U.S. 597, 598 (1958) 11

Zacchini v. Scripps-Howard Broadcasting Co.
433 U.S. 562, 566 (1977) 11

STATUTES

28 U.S.C. § 1257(2) (1976) 9
28 U.S.C. § 1257(3) (1976) 10

Chapter 7.16 Wash. Rev. Code 2
Chapter 43.21C Wash. Rev. Code 2
Chapter 58.17 Wash. Rev. Code 2
Chapter 90.58 Wash. Rev. Code 4

Wash. Rev. Code § 58.17.100 . . . . . 3, 13
Wash. Rev. Code § 58.17.110 . . . . . 3, 13
Wash. Rev. Code § 58.17.180 . . . . . 3, 6
Wash. Rev. Code § 90.58.180 . . . . . 3, 13
Wash. Rev. Code § 90.58.360 4

OTHER

Respondent's Stipulation and Order on Issues Under Review at pp. 1-2 (Thurston County Superior Court Cause No. 58623), (See Lake Lawrence Inc., v. Thurston County et al., U. S. Supreme Court No. 79-1800 App. to Jurisdictional Statement at p. A-107) 7

THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE

This case arises from the appeal by Lake Lawrence, Inc. from the decision of the Washington Supreme Court in Department of Natural Resources v. Thurston County, 92 Wash. 2d 656, 604 P.2d 494 (1979). The decision is also the subject of a writ of certiorari sub nom. Department of Natural Resources v. Thurston County, U. S. Supreme Court No. 79-1844.

The case below is a tale of two permits: a preliminary plat permit which is administered by the Board of Thurston County Commissioners pursuant to Chapter 58.17 Wash. Rev. Code, and a shoreline substantial development permit which is initially administered by the Board of County Commissioners, but is ultimately controlled by the state Shorelines Hearings Board under Chapter 90.58 Wash. Rev. Code.

The case below also raised the question as to the responsibility of differing agencies to consider the environmental consequences of a project under the State Environmental Policy Act (SEPA), Chapter 43.21C Wash. Rev. Code, and the legal consequences when two agencies reach different conclusions as to the environmental consequences of a project.

The project in question was a proposal to subdivide 14 acres of land leased by the applicant, Lake Lawrence, Inc., hereinafter referred to as the "Applicant," from the State of Washington, Department of Natural Resources, hereinafter referred to as the "Department."

The County Commissioners required an Environmental Impact Statement and thereafter held public hearings on the proposal in August and September, 1977. Wash. Rev. Code § 58.17.100. Plat review is based on the public interest to be served by the development, and approval is discretionary with the Commissioners. Wash. Rev. Code § 58.17.110 On September 28, 1977, the County Commissioners determined that the site was actively used by bald eagles as a feeding and perching area and that portions of the project contemplated by the Applicant materially disrupted that use. The County Commissioners determined the project to be inconsistent with the comprehensive plan and contrary to the public interest, and decided to deny the preliminary plat and the necessary shoreline substantial development permit.

The Applicant and the Department filed two appeals: (1) The plat denial was appealed to the local superior court for a writ of review to determine whether the decision was arbitrary, capricious, corrupt or unlawful. The procedure followed is spelled out in Wash. Rev. Code § 58.17.180 and Chapter 7.16 Wash. Rev. Code, governing special proceedings. The record was delivered to the court and the matter was set for trial on April 16, 1978. (2) The shoreline substantial development permit denial was appealed by the Applicant and the Department to the state Shorelines Hearings Board for a de novo hearing on whether the project was consistent with the state Shoreline Management Act. The procedure followed is spelled out in Wash. Rev. Code § 90.58.180, et seq.

The shoreline permit case was tried in February, 1978 and decided March 23, 1978. The Shorelines Hearings Board determined that

the project was consistent with the state Shoreline Management Act and that the proposal adequately mitigated the adverse environmental impacts identified during the proceedings.

The Shorelines Hearings Board remanded the case back to the County Commissioners for further proceedings consistent with the decision. The decision specifically noted the provisions of the state Shoreline Management Act, Wash. Rev. Code § 90.58.360, which require that all other permits must be obtained before the proposal can proceed. App. at A-59.

Upon receiving the decision of the Shorelines Hearings Board, the County Commissioners petitioned the Superior Court to have the record remanded for reconsideration of the plat denial in view of the decision of the state Shorelines Hearings Board.

The court granted the requested remand on April 10, 1978. Counsel for Lake Lawrence was not at the April 10, 1978 hearing, but did petition the following week for reconsideration. On April 17, 1978, the request for reconsideration was denied and at the applicant's request, the trial court did direct that all subsequent appeals, if any, be consolidated and heard on July 6 and 7, 1978.

Counsel for Lake Lawrence did not appeal the denial of reconsideration or the order remanding the proceedings for reconsideration.

On April 10, 1978, the Commissioners visited the site as a preliminary to holding the rehearing on the preliminary plat. The visit was a special meeting of the Board duly called in open session in accordance with state law.

On April 18, 1978, the County Commissioners held a public hearing in accordance with the remand order and in accordance with the public notice as required by state law. Counsel for both the Department and the Applicant were present and participated fully in argument and presentation of additional factual evidence.

Counsel for the Applicant submitted the entire record of the Shorelines Hearings Board proceedings into the record before the County Commissioners and presented substantial comment and argument on the case.

Counsel for both the Department and the Applicant were specifically advised of the site visit and were asked if they objected to one or more of the Commissioners participating in the final decision. Both counsel said they had no objection to all three Commissioners hearing and deciding the case.

The County Commissioners again denied the preliminary plat on rehearing on April 24, 1978.

The Department and the Applicant immediately filed for a writ of mandamus to direct the issuance of both the substantial development permit and the preliminary plat. The allegations in the complaint were duly denied by the County and trial was held May 22, 1978. Counsel for the Department and Lake Lawrence called no witnesses, and, in spite of the denial by the County of all material allegations, submitted the case on the pleadings. The trial court denied the requested writ.

The Department and Applicant filed a writ of review to have the court consider the validity of the plat denial.

The Applicant also moved for reconsideration of the denial of the writ of mandamus which was consolidated with argument on the merits of the plat denial.

A stipulation was entered into for purpose of argument on the issues of lawfulness under Wash. Rev. Code § 58.17.180. The Department and the Applicant conceeded that the findings by the County were supported by evidence in the record and were not "arbitrary or capricious."

The stipulation further provided in pertinent part:

> The parties hereto do stipulate as follows:
>
> 1. The parties agree there is one issue of law for the Court to consider; that is whether Respondents, on April 24, 1978 and thereafter, had constitutional and legislative authority to do the following:
>
> (a) Hold new public hearings on the approval or disapproval of the preliminary plat and hear new evidence on the same factual issues (e.g. eagle habitat) having already been presented to the Shoreline Hearings Board;
>
> (b) Make a decision on the record before the Shoreline Hearings Board

> and the evidence at new public hearings contrary to and in conflict with the prior Shoreline Hearings Board judgment on the same matter;
>
> (c) Enter Findings of Fact, Conclusions of Law, and Judgment contrary to and in conflict with the Shoreline Hearings Board judgment of March 23, 1978.

. . . .

> 3. If the answer to the issue posed in item one (1) above is in the negative (that is the Board of County Commissioners is found without constitutional and legislative authority to make the decision it did), then the matter of damages of the Petitioner will be scheduled for a separate hearing before the Court, without prejudice to any defense, legal or equitable, which may be raised by Respondents herein.

Respondents' Stipulation and Order on Issues Under Review at pp. 1-2 (Thurston County Superior Court Cause No. 58623), (See Lake Lawrence Inc. v. Thurston County et al., U. S. Supreme Court No. 79-1800 App. to Jurisdictional Statement at p. A-107.)

Argument on the lawfulness of the plat denial and reconsideration of the denial of the writ of mandamus was held July 28, 1978.

The trial court entered its decision on August 11, 1978, and on September 25, 1978, issued findings of fact and conclusions of law and judgment directing issuance of the substantial development permit and preliminary plat.

Thurston County timely appealed and obtained a stay of the judgment directing issuance of the permits and of the trial on the issue of damages.

The Washington Supreme Court heard argument, issued its decision, denied motions for reconsideration, and ultimately issued its mandate February 23, 1980. The petition for writ of certiorari was filed on May 23, 1980, and the jurisdictional statement was filed for the appeal on May 28, 1980. The Clerk has granted Respondents until June 30, 1980, to respond to both actions.

ARGUMENT

The appeal is unsubstantial for several reasons. The statutes alleged to be unconstitutional by the Applicant are substantially similar to statutes which have been recently upheld by this Court. The statutory conflicts raised by the Applicant are conflicts between the workings of different state laws which are not properly subject to appeal before this Court. Finally, the Applicant raises issues of fact which were resolved against the Applicant in the lower courts, and which were not properly preserved on appeal by the Applicant.

1. The Appeal Should be Dismissed for Failure to Raise a Substantial Federal Issue.

Applicant seeks the jurisdiction of this Court under 28 U.S.C. § 1257(2) (1976). The only jurisdictional basis for appeal in this case is the holding implied in the court below that Washington's State Environmental Policy Act, Chapter 43.21C Wash. Rev. Code, Platting and Subdivision Act, Chapter 58.17 Wash. Rev. Code, and Shoreline Management Act, Chapter 90.58 Wash. Rev. Code, do not operate to unlawfully deprive the Applicant of property without due process of law or just compensation under the Fifth and Fourteenth Amendments of the United States Constitution.

The claim is patently specious. This Court has frequently upheld the authority of state and local governments to adopt land use regulations for the protection of the community. Such regulations may well prohibit an applicant from pursuing a favored or desired land use as they did in the present case. Such a bar standing along does not lead to an invalidation of such laws even when based on environmental or aesthetic concerns. Agins v. City of Tiburon, 40 CCH S. Ct. Bull. p. B2864 (No. 79-602, June 10, 1980); Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

Counsel has pointed to no feature of any of the statutes which would raise a substantial federal issue and the appeal is therefore groundless.

2. The Decision Below Should be Affirmed.

The balance of issues raised by Applicant are issues more properly considered by this Court under 28 U.S.C. § 1257(3) (1976), but even these issues do not give rise to an issue which warrants the noting of jurisdiction or an approval of certiorari.

The Applicant first seeks to have this Court reinstate the holdings of the trial judge which were based on the trial court's belief that the decision of the Shorelines Hearings Board precluded an independent environmental review by the Board of Thurston County Commissioners.

The court below ruled that under Washington law, the County Commissioners had the obligation to conduct an independent environmental review in connection with the platting process. As stated by the court below:

> It follows from our conclusion that the Commissioners are not bound by the finding of the Shorelines Hearings Board that they had authority to take additional testimony for the purpose of reconsidering the plat proposal, and had authority to deny the plat on the ground it was inadequate to protect the County's valued resource of a perching and feeding site for the endangered bald eagle.

Department of Natural Resources v. Thurston County, 92 Wash. 2d 656, 667, 601 P.2d 494 (1979).

The authority of a Washington State Board of County Commissioners vis-a-vis the

Washington state Shorelines Hearings Board in reviewing a plat, is a matter of State interest raising no significant federal question. This Court has consistently refused to consider issues which involve only state issues. See, e.g., Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977); Wilson v. Loew's, Inc., 355 U.S. 597, 598 (1958).

The Applicant next seeks to have this Court act as a trial court to resolve factual issues pertaining to the conduct or misconduct of the County Commissioners in holding hearings and making its decision to deny the preliminary plat. This Court has long held that it will not grant certiorari to review evidence and discuss specific facts. United States v. Johnston, 268 U.S. 220, 227 (1925); see also, Lloyd A. Fry Roofing Co. v. Wood, 344 U.S. 157, 160 (1962).

At trial, counsel argued misconduct of the County Commissioners as one of the grounds for ruling in Applicant's favor. While ruling for the Applicant on the legal issues involving the Shorelines Hearings Board, the trial court refused to enter any of the requested findings pertaining to misconduct by the County Commissioners in handling the case. The Washington State Supreme Court likewise took note of the Applicant's claim and found that Applicant's procedural rights had not been violated.

As stated in Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949):

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in

> the absence of a very obvious and exceptional show of error."

Id. at 275.

Furthermore, the Applicant took no exception to the failure of the trial court to enter the requested findings of misconduct. Thus, even if the conduct raised a federal question worthy of consideration by this Court, the Applicant failed to properly present and preserve the issue on appeal. This Court has long held that preservation of federal issues is not discretionary, but jurisdictional to the Court. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).

Applicant's claim that it is entitled to a new trial on the taking issue is also frivolous. Appellant's submission of the case below on the administrative record and stipulation and failure to present evidence on the factual issues pertaining to the taking issue at the several opportunities below, certainly precludes the Applicant from now seeking such relief from this Court.

Furthermore, the court below fully considered the taking claim and ruled that given the availability of development to different configurations or density within the same property, no taking occurred under state and federal laws. This issue is discussed in great detail in Respondents' Brief in Opposition, filed in connection with the companion case. Department of Natural Resources v. Thurston County U. S. Supreme Court No. 79-1844, Respondents' Brief at pp. 9-12.

CONCLUSION

The Applicant's central contention appears to be that in making findings of fact contrary

to the findings of fact made by the Shorelines Hearings Board, the County Commissioners somehow violated the Applicant's fundamental rights, and in denying the requested plat configuration, took the Applicant's property without just compensation.

Given the fact that the County Commissioners held different hearings from the Shorelines Hearings Board and made its decision on the basis of its own record, not just the record before the Shorelines Hearings Board, the difference in findings and conclusions is certainly explainable. When the difference in legislative mandates is also considered, (compare Wash. Rev. Code § 58.17.100-110 with Wash. Rev. Code § 90.58.180) the fact that two agencies came to different conclusions on different records can hardly be said to be surprising, let alone a violation of fundamental federal rights.

The taking claim raised is factually and legally without merit.

The appeal is totally without merit and should be dismissed.

DATED this 30th day of June, 1980.

Respectfully submitted,

PATRICK D. SUTHERLAND
Thurston County Prosecuting Attorney

ALEXANDER W. MACKIE
Special Deputy Prosecuting Attorney
Owens, Weaver, Davies & Dominick
926 - 24th Way, SW
Olympia, WA 98502

Counsel for Respondents

No. 79-1880

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

LAKE LAWRENCE, INC., et al.,

Appellant,

v.

THURSTON COUNTY, et al.,

Appellees.

MOTION OF APPELLEES TO DISMISS OR AFFIRM

Certificate of Service

Alexander W. Mackie, duly admitted and qualified as an attorney and counselor of the Supreme Court of the United States, hereby certifies in compliance with Rule 33(b) that he has caused to be served on all parties required to be served herein on June 30, 1980, three copies of the Brief of Respondent in Opposition by placing the same in an envelope, addressed as below set forth, and by depositing the same in the Post Office of the City of Olympia,

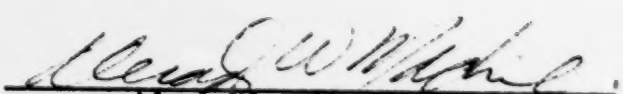
Thurston County, Washington, postage prepaid thereon, to-wit:

The Honorable Slade Gorton, Attorney General
Edward B. Mackie, Deputy Attorney General
Joseph Lawrence Coniff, Jr., Assistant
Attorney General
Temple of Justice
Olympia, WA 98504

Philip P. Malone
Attorney at Law
P. O. Box 443
Poulsbo, WA 98370

Thomas H. S. Brucker
Smith, Brucker, Winn & Elhert
Attorneys at Law
1411 Fourth Avenue Building
Seattle, WA 98101

Charles Roe
Robert Jensen
Assistant Attorneys General
Temple of Justice
Olympia, WA 98504



Alexander W. Mackie
Counsel for Respondent